(4)

No. 06-211

In the Supreme Court of the United States

JOHN GILMORE, PETITIONER

v.

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner alleges that respondents have promulgated "security directives" relating to airline safety that require airline passengers to present identification before boarding or, in the alternative, submit to a more extensive search than would otherwise be required.

The question presented is whether, under the Due Process Clause, petitioner received sufficient notice of the above requirement where petitioner had actual notice of that requirement through oral instructions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 435 F.3d 1125. The opinion of the district court (Pet. App. 27a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2006. A petition for rehearing was denied on April 5, 2006 (Pet. App. 42a). On June 20, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 4, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The federal government protects against airline hijacking and similar threats through a comprehensive statutory and regulatory regime. Federal law prohibits certain conduct that is threatening or dangerous to airline security and safety, such as "aircraft piracy," threatening or assaulting a member of a flight crew, or taking any action posing an imminent threat to the safety of the aircraft or other individuals on board. See 49 U.S.C. 46502(a), 46318. It is also a crime to carry a concealed weapon, loaded firearm, or explosive device on board an aircraft, or while attempting to board. 49 U.S.C. 46505(b). All passengers and property must be screened before boarding, see 49 U.S.C. 44901(a) (Supp. III 2003), to ensure that no one is carrying a dangerous weapon or similar device, 49 U.S.C. 44902(a) (2000 & Supp. III 2003); see 49 C.F.R. 1540.107. Airlines must "refuse to transport" a passenger who does not consent to a search of his person or baggage, 49 U.S.C. 44902(a) (2000 & Supp. III 2003); 49 C.F.R. 1540.107, and they are authorized to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety," 49 U.S.C. 44902(b) (Supp. III 2003).

b. Congress has charged the Under Secretary of Transportation for Security, who is the head of the Transportation Security Administration (TSA), with overall responsibility for airline security, and has conferred on him authority to carry out that responsibility. 49 U.S.C. 114(d) (Supp. III 2003).[1] The Under Secretary

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[1] The Under Secretary and TSA itself were both originally placed within the Department of Transportation. 49 U.S.C. 114(a) and (b)(1) (Supp. III 2003). TSA's functions, as well as the Under Secretary's,

must take "necessary actions to improve domestic air transportation," 49 U.S.C. 44904(c) (Supp. III 2003), in part by promulgating "regulations to protect passengers and property on an aircraft * * * against an act of criminal violence or aircraft piracy," 49 U.S.C. 44903(b) (2000 & Supp. III 2003). The Under Secretary can also issue "Security Directive[s]" to aircraft operators when he "determines that additional security measures are necessary to respond to a threat assessment." 49 C.F.R. 1544.305(a). Compliance with those Directives by air transport personnel is mandatory. 49 C.F.R. 1544.305(b).

The Under Secretary must also ensure that federal agencies "share * * * data on individuals identified * * * who may pose a risk to transportation or national security," "notify[] * * * airport or airline security officers of the identity of [such] individuals," and "establish policies and procedures requiring air carriers * * * [to] prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual." 49 U.S.C. 114(h)(1)-(3) (Supp. III 2003). TSA has implemented those provisions through a series of Security Directives and Emergency Amendments to air carrier security programs, which include a list of individuals who are either barred from boarding an aircraft altogether (the "no fly list") or required to

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were transferred from the Department of Transportation to the Department of Homeland Security (DHS) pursuant to Section 403(2) of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2178 (6 U.S.C. 203(2) (Supp. IV 2004)). The Under Secretary is now known as the Administrator of the TSA. 49 C.F.R. 1500.3. Because federal statutes continue to refer to the head of TSA as the "Under Secretary," we do so in this brief as well.

undergo additional screening prior to boarding (the "selectee list").

c. Except in narrowly-defined circumstances, federal law prohibits the disclosure of sensitive security information related to commercial air travel. Notwithstanding the Freedom of Information Act, 5 U.S.C. (2000 & Supp. IV 2004) (FOIA), "the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security * * * if the Under Secretary decides that disclosing the information would * * * be detrimental to the security of transportation." 49 U.S.C. 114(s)(1)(C) (Supp. III 2003); see 49 U.S.C. 40119(b)(1)(C) (Supp. III 2003) (similar authority for Secretary of Transportation).

Pursuant to that authority, the Under Secretary has defined a set of information known as "sensitive security information" (SSI), see 49 C.F.R. 1520.3, and directed that such information shall not be disclosed except in certain limited circumstances not applicable here. 49 C.F.R. 1520.9(a)(2) ("A covered person must * * * [d]isclose * * * SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA.").[2] The Under Secretary has defined SSI to include "[a]ny security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including * * * [a]ny aircraft operator or airport operator security program" and "[a]ny

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[2] Covered persons are defined in 49 C.F.R. 1520.7. Persons with a need to know are defined in 49 C.F.R. 1520.11. Petitioner did not argue below, and does not argue now, that he is a covered person or has a need to know.

Sensitive security information may be disclosed if TSA provides in writing that it is "in the interest of public safety or in furtherance of transportation security" to do so. 49 C.F.R. 1520.5(b).

Security Directive * * * [i]ssued by TSA." 49 C.F.R. 1520.5(b)(1)(i), (b)(2)(i). By regulation, aircraft operators must also "[r]estrict the distribution, disclosure, and availability of information contained in the security program to persons with a need-to-know." 49 C.F.R. 1544.103(b)(4).

2. a. On July 4, 2002, petitioner arrived at the Oakland International Airport with a ticket to fly to Baltimore-Washington International Airport. Petitioner presented his ticket to representatives at Southwest Airlines, but refused to show any identification when asked to do so by the Southwest representatives. The airline informed petitioner that he would not be permitted to board without showing identification, but he again refused and asked if he could fly without showing identification. The airline employee told petitioner that he could choose instead to be screened at the boarding gate rather than present identification. Petitioner then went to the boarding gate but again refused to show identification. Petitioner was not permitted to board, and he then left the airport without further incident. Pet. App. 5a-6a; C.A. E.R. 5-6.

The same day, petitioner went to the San Francisco International Airport to buy a ticket to Washington, D.C. from United Air Lines. While at the ticket counter, petitioner saw a sign that read: "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." Petitioner was again asked to present identification, and he once again refused. Petitioner was told by United personnel that he could not fly without showing identification, but was subsequently informed by airline personnel that he could choose either to show identification or be a "selectee," which meant that he would be subject to an "intense search" of his person

and property—a search more intensive than would otherwise be conducted if petitioner showed his identification. Petitioner refused both options, and he once again left the airport without further incident. Pet. App. 6a-7a; C.A. E.R. 6-7.

b. On July 18, 2002, petitioner filed this action in the United States District Court for the Northern District of California.[3] Petitioner alleged that respondents have issued "security directives requiring that airlines demand travelers reveal their identity before they are permitted to board an airplane." C.A. E.R. 5. Petitioner contended that the identification-or-search requirement violates due process because the alleged security directives containing the requirement are unpublished and therefore do not provide him with sufficient notice. *Id.* at 12. Petitioner further argued that those directives vest standardless discretion in those who enforce them, and hence violate due process. *Ibid.* He also contended that the asserted requirement violates his Fourth Amendment right against unreasonable searches and seizures, *id.* at 12-13; his right to travel, *id.* t 13; and his First Amendment rights to associate and petition the

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[3] The federal defendants named in the complaint are the Attorney General of the United States; the Director of the Federal Bureau of Investigation; the Secretary of Transportation; the Administrator of the Federal Aviation Administration; the Administrator of the Transportation Security Administration; and the Secretary of the Department of Homeland Security. See Pet. ii. See also C.A. E.R. 87; Pet. App. 28a n.2.

Petitioner also named United Air Lines and Southwest Airlines in his complaint. United filed a petition for bankruptcy and claims against it were stayed pursuant to the Bankruptcy Code's automatic stay provision. 11 U.S.C. 362(a). All parties agreed in the district court to sever all claims against United Air Lines. See C.A. E.R. 86; Pet. App. 28a n.1.

government for redress of grievances, *id.* at 13-14.[4] Finally, the complaint criticized many other alleged government activities, such as the government's definition of a "terrorist," *id.* at 3, 10, "scrutiniz[ation] by facial-recognition systems," *id.* at 11, and "the government's plan to create huge, integrated databases by mingling criminal histories with credit records, previous travel history and much more, in order to create dossiers on every traveling citizen," *id.* at 2-3.

c. The district court granted the government's motion to dismiss. Pet. App. 27a-41a. The court first held that petitioner lacked standing to challenge anything other than the alleged identification-or-search requirement. *Id.* at 30a-32a. Because petitioner's only alleged injury was his inability to board an airplane, and because the only alleged cause of that injury was the identification-or-search requirement, petitioner had standing only to challenge that requirement. *Id.* at 31a-32a.

Next, the district court held that it lacked jurisdiction to entertain petitioner's due process claim. Pet. App. 32a-34a. Because 49 U.S.C. 46110(a) (Supp. III 2003) vests exclusive jurisdiction in the courts of appeals to review an "order issued by the * * * Under Secretary of Transportation for Security," and because petitioner's due process claim "squarely attacks the orders or regulations issued by the TSA and/or the FAA with respect to airport security," Pet. App. 33a, the court held that it lacked jurisdiction over the due process claim.

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[4] Petitioner also brought a claim under FOIA and a claim under the Equal Protection Clause. C.A. E.R. 14-15. He withdrew those claims before the district court. Pet. App. 28a n.3.

The district court rejected petitioner's Fourth Amendment claim on the merits. Pet. App. 34a-38a. The court held that the request for identification was not a seizure because petitioner was free to refuse the request and leave the airport. *Id.* at 34a-37a. The court further held that a search before boarding an airplane is not unreasonable under the Fourth Amendment, because it is no more extensive than necessary, confined in good faith to a search for weapons or explosives, and passengers can avoid the search by choosing not to fly. *Id.* at 37a-38a.

The court similarly concluded that the challenged identification-or-search requirement does not unreasonably burden petitioner's right to travel, because it applies only to one form of transportation. Pet. App. 38a-39a. Finally, the district court rejected petitioner's right-to-associate and right-to-petition claims, because the identification-or-search requirement imposed only a minimal, indirect or incidental burden on those rights. *Id.* at 39a-40a.

d. The Ninth Circuit affirmed. Pet. App. 1a-26a. The court held that petitioner lacked standing to challenge anything other than the identification-or-search requirement, *id.* at 14a-16a, and that the district court had lacked jurisdiction over all of petitioner's remaining claims because exclusive jurisdiction was vested in the court of appeals, *id.* at 9a-13a. To cure the jurisdictional defect, however, the court transferred the case to itself under 28 U.S.C. 1631, see Pet. App. 13a-14a, and reached the merits of petitioner's claims.

The court of appeals (Pet. App. 16a-18a) rejected petitioner's due process claim that he received inadequate notice of the identification-or-search requirement because petitioner "had *actual notice*" of the identification-

or-search requirement: "several airline personnel * * * told him that in order to board the aircraft, he must either present identification or be subject to a 'selectee' search." *Id.* at 17a (emphasis added).

The court also held that the identification-or-search requirement did not vest unbridled discretion in airline security personnel. Pet. App. 18a. Reviewing materials that the government had filed *in camera* and *ex parte* (see p. 11, *infra*), the Court found that the requirement "articulates clear standards." *Ibid.* Furthermore, "because all passengers must comply with the identification policy, the policy does not raise concerns of arbitrary application." *Ibid.*

The court of appeals rejected petitioner's remaining claims as well. The court explained that the identification-or-search requirement does not violate petitioner's right to travel because it applies to only one form of transportation, Pet. App. 19a-20a, and is not an unreasonable burden on that right, *id.* at 20a-21a. Nor, in the court's view, does the requirement violate the Fourth Amendment, because a request for identification is not a seizure if petitioner is permitted to refuse and walk away, *id.* at 21a-22a, and any search is reasonable because it is a limited intrusion, confined to the administrative need justifying the search (preventing passengers from carrying weapons or explosives onboard), and a person is free to avoid the search by electing not to fly, *id.* at 23a-24a. Finally, the court rejected petitioner's right-to-associate and right-to-petition claims, because neither right was unreasonably burdened. *Id.* at 25a-26a.

e. As noted above, petitioner's complaint alleges the existence of certain security directives and that those directives contain the identification-or-search require-

ment. In the proceedings below, respondents did not publicly confirm the existence or content of the alleged security directives. They did so for two reasons. First, because the government moved to dismiss, all the parties and the courts below were required to assume the truth of petitioner's allegations as stated in his complaint—including the existence of certain security directives and the content of an identification-or-search requirement. Accordingly, it was unnecessary and irrelevant for the government to comment on the truth of petitioner's allegations, as it would have been in any case in which the government moved to dismiss. Second, as noted above (p. 4-5, *supra*), TSA security directives constitute sensitive security information. Therefore, under the applicable federal statute and accompanying regulations, and absent any relevant exception, they may not be disclosed in open court, to petitioner, or to petitioner's counsel.

The sole exception, however, is that prior to briefing in the court of appeals, TSA determined that "releasing *certain portions* of security procedures will improve transportation security to a greater extent than maintaining confidentiality of the procedure." 69 Fed. Reg. 28,070-28,071 (2004) (emphasis added). The agency thus made public that "as part of its security rules, TSA requires airlines to ask passengers for identification at check-in." *Ibid.*[5]

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[5] TSA has publicly disclosed *some portions* of its security procedures. Petitioner repeatedly suggests, however, that respondents have acknowledged the existence of certain security directives and their entire contents. See, *e.g.*, Pet. 7-8. That claim is incorrect. Respondents never confirmed whether the allegations in petitioner's complaint were correct; respondents simply assumed them to be true for purposes

Before the court of appeals, however, respondents moved to file relevant materials under seal, for that court's *in camera* and *ex parte* review, which the court granted following oral argument.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioner has not pointed to any other decision that has even considered the question whether TSA gives adequate notice of the identification-or-search requirement. Moreover, notwithstanding his long discourse on the history of written statutes and the importance of notice generally, petitioner does not seriously challenge the court of appeals' actual holding: that because petitioner "had actual notice" of the identification-or-search requirement at issue, he had adequate notice of it for due process purposes. See Pet. App. 17a. In any event, petitioner's as-applied due process challenge is fact-bound and does not present an issue of widespread national importance. This Court's review is unwarranted.

1. Petitioner presents only one question for review, arguing that, because the identification-or-search requirement is unpublished, it fails to provide him with adequate notice of what the law requires.[6] As the court

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of its motion to dismiss. Respondents were clear on that point in both their brief below, see Gov't C.A. Br. 9-10 n.6, and at oral argument.

[6] Petitioner does not pursue any of the other numerous constitutional challenges presented below, including his due process challenge that TSA's requirement confers unfettered discretion on security officials, or that the requirement violates his rights under the First Amendment and the Fourth Amendment. Moreover, although the petition makes brief reference to the rights to travel and assemble, see Pet. 10, it does not actually present any argument that those rights are

of appeals correctly held, however, petitioner "had *actual notice* of the identification policy."[7] Pet. App. 17a (emphasis added). Petitioner alleged in his complaint that he saw a sign at the airport reading "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN," *ibid.*; C.A. E.R. 6, and petitioner was told by each airline involved that he could either present identification or submit to a more extensive search, Pet. App. 5a (Southwest clerk "informed Gilmore that he could opt to be screened at the gate in lieu of presenting the requisite identification"); *id.* at 6a (United employee "informed Gilmore that he could fly without identification by undergoing a more intensive search"); C.A. E.R. 5, 7. In fact, petitioner had actual knowledge of the requirement *before* he went to the airports, as the very purpose of his trip was to travel to Washington, D.C. to protest the requirement. Pet. 5.

Petitioner argues that adequate notice must be something he can "*see*," Pet. 9, describing at length the history of written statutes, *id.* at 14-17. The argument is incorrect. Due process may be satisfied by "*oral* or written notice," *Goss* v. *Lopez*, 419 U.S. 565, 581 (1975) (emphasis added), that is "of such nature as reasonably to convey the required information," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 536 (1985) (due process satisfied by "oral or written notice").

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violated; nor are such questions fairly encompassed in his question presented, see Pet. i. In any event, like the issue actually presented, none of those questions would warrant this Court's review.

[7] The court of appeals' phrase "identification policy" refers to both alternatives—either presenting identification or submitting to a more exacting search. See Pet. App. 3a.

The oral instructions given to petitioner by airline personnel plainly supplied the requisite notice.[8]

Nor, as petitioner claims, was he "misinformed" by the oral notice. Pet. 4 n.2; see also Pet. 5, 9. Petitioner alleges that one Southwest employee did not offer him the alternative of a more extensive search in lieu of presenting identification, Pet. 8 n.3, but as the court of appeals noted, by that time the airline had already explained both alternatives to petitioner. Pet. App. 5a-6a. Petitioner also asked United employees if he could fly without showing identification. As alleged in his complaint, although one clerk initially thought that identification was always required, another United employee quickly explained to petitioner the alternative search option. C.A. E.R. 7. Petitioner's due process claim of inadequate notice thus ultimately rests upon his allegation that one airline clerk initially informed him of one requirement, before being corrected by another clerk. That allegation is hardly tantamount to a deprivation of the adequate notice required by the Due Process Clause.

Even if written publication were required to satisfy due process, the relevant law is, in fact, published. The law is quite clear that a passenger may not commit aircraft piracy, 49 U.S.C. 46502(a)(2), may not physically assault or threaten a member of a flight or cabin crew or

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[8] Petitioner's argument (Pet. 2, 8 n.3) for written notice based on the Federal Register Act, 44 U.S.C. 1505, is misplaced. That statute applies to "Presidential proclamations and Executive orders" and other documents not at issue here. 44 U.S.C. 1505(a). Nor did petitioner raise that statute below. Equally misplaced is petitioner's invocation (Pet. 3, 19) of FOIA. Petitioner specifically abandoned his FOIA claim, see note 4, *supra*, and Congress has authorized TSA to promulgate regulations prohibiting the disclosure of information "[n]otwithstanding section 552 of title 5." 49 U.S.C. 114(s)(1) (Supp. III 2004).

take any action that poses an imminent threat to the safety of the aircraft or other individuals on board, 49 U.S.C. 46318, and may not have a concealed weapon, loaded firearm, or explosive device on one's person or in one's property while on board, or attempting to board, an aircraft, 49 U.S.C. 46505(b). Petitioner, of course, is entitled to notice of those laws, so that he may "understand what conduct is prohibited," *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983), and he in fact has full notice of those laws as they are published in the United States Code.

What petitioner seeks, however, is not notice of the law but notice of the *law enforcement detection techniques* that respondents might use to detect or deter violations of the law. But citizens have no due process entitlement to advance notice of such information. For instance, citizens have the right to know in advance that trafficking in illegal drugs is a crime, but they have no due process right to advance notice of a drug trafficking profile that the government might use to identify potential criminals. Similarly, passengers have a right to know the law, but they have no due process entitlement to advance notice of how the government might attempt to discover whether the law is being broken. The identification-or-search requirement is a technique used to detect possible violations of the law, such as the prohibition on carrying a weapon or explosive onto the plane, 49 U.S.C. 46505(b), or a violation of the no-fly list.[9]

Under FOIA, materials describing the "investigative techniques" of a government agency are exempt from

[9] As noted above, petitioner was not punished for refusing to show identification or submit to a search before boarding, nor was he sanctioned for attempting to board an airplane after that refusal.

disclosure, because disclosure would "assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection." *Caplan* v. *Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978). Disclosure in such cases "would not promote lawful behavior; it would only facilitate law evasion." *Id.* at 548. See also *Hardy* v. *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980) ("We hold that law enforcement materials, disclosure of which may risk circumvention of agency regulation, are exempt from disclosure."); *Hawkes* v. *IRS*, 467 F.2d 787, 795 (6th Cir. 1972) (nondisclosure is appropriate "where the sole effect of disclosure would be to enable law violators to escape detection"). The same principle applies to advance notice under the Due Process Clause: petitioner has a due process right to know what the law is, so that he may conform his actions to it rather than be subject to criminal sanctions, but he has no corollary due process right to know the details of how the government intends to detect violations. If petitioner's due process argument were correct, he and all others would have a constitutional right to advance notice of the details of *all* airline security procedures, a prospect that would serve no due process interest, but that would obviously aid those who want to avoid or circumvent airline security measures.

2. a. Petitioner argues in the alternative (Pet. 18-21) that the alleged security directives at issue may not be prohibited from disclosure under 49 U.S.C. 114(s) (Supp. III 2003), either because they do not contain "information" as required by the statute, Pet. 19, or because TSA has not made certain factual findings, Pet. 20. Contrary to petitioner's claim (Pet. 18 n.5), the court of appeals did not reach either question, nor did petitioner present

them below. Respondents did maintain below that security directives constitute sensitive security information and therefore cannot be disclosed under applicable law, see Pet. App. 7a & n.3, and the court of appeals ordered respondents to file relevant materials under seal for *in camera, ex parte* review, *id.* at 9a, but the court of appeals had no occasion to decide whether any applicable directives were, in fact, prohibited from disclosure under law because petitioner never argued to the contrary.[10]

Petitioner's argument, moreover, is entirely different from the one he raised in the court of appeals. Petitioner never argued for *disclosure* of security directives. In fact, he specifically abandoned his claim for disclosure under FOIA. See note 4, *supra*. And the petition does not seek review of the court of appeal's decision to review the relevant materials *ex parte* and *in camera*. Instead, petitioner argued that, because TSA did not disclose relevant security directives, those directives should be *voided* for lack of adequate notice. The claim that directives should be voided for lack of notice is entirely different from the claim that respondents incorrectly failed to disclose the directives. Indeed, the claim that directives should be voided for lack of notice is entirely dependent on the agency's *non*-disclosure. Having abandoned any claim that disclosure of security directives is required, petitioner may not now contend that the agency's decision to prohibit disclosure was improperly made.

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[10] Petitioner did object below to respondents' motion to file materials under seal for *in camera, ex parte* review, but his objection was not based on the argument that the materials were improperly classified as sensitive security information.

b. Even if the Court were to reach the issue, petitioner's argument is meritless. Petitioner first argues that the alleged security directives do not contain "information," as the governing statute requires. Pet. 19. But the ordinary dictionary definition of that word encompasses instructions relating to airline security measures. See 7 *The Oxford English Dictionary* 944 (2d ed. 1989) (defining "information" to mean "[a]n item of training; an instruction"). Moreover, TSA has construed the governing statute to permit the non-disclosure of security directives, see 49 C.F.R. 1520.5(b), and because Congress has expressly granted rulemaking authority to TSA in this precise area, see 49 U.S.C. 114(s)(1)(C) (Supp. III 2003), the agency's interpretation is entitled to deference so long as its construction is a reasonable one, see *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). Petitioner has not and cannot show that the agency's construction of the word "information" to include instructions on security measures is unreasonable.

Petitioner also argues that the government has never explained why non-disclosure is necessary. Pet. 20. This, of course, is because petitioner never raised any such challenge to the SSI determination. In any event, it is plain that disclosures of security procedures only aid those who would seek to circumvent them, thereby posing a risk to airline safety. Although TSA has concluded that *some portions* of security procedures may be disclosed because doing so will improve security in specific situations, the agency is plainly entitled to make case-by-case determinations as to whether disclosure is harmful or helpful. Petitioner offers no reason to question the agency's decision in this particular case.

3. The question presented does not have widespread national importance. Although petitioner alleges (Pet.

1, 9) that the identification-or-search requirement is applied to millions of airline passengers, petitioner's specific due process claim is not a facial challenge that could potentially apply to many others, but is an as-applied challenge peculiar to him and dependent upon the allegations stated in his complaint. Accordingly, the question presented has relevance only for petitioner.

As noted above, petitioner's due process claim of inadequate notice essentially reduces to the contention that he was allegedly told two different requirements by two different airline clerks. But that claim is entirely dependent upon the specific allegations in petitioner's complaint, and any due process ruling on that particular claim would have no impact upon the millions of other airline passengers. Rather, petitioner's due process challenge is that the identification-or-search requirement did not provide adequate notice *as it was applied to him*, because he was allegedly misled as to its requirements by what employees of Southwest and United said to him in particular. Pet. 8 n.3; see Pet. C.A. Br. 2 (phrasing question presented as an as-applied challenge). Accordingly, petitioner's narrow, as-applied due process claim has no national significance warranting this Court's review.

Finally, petitioner relies upon a statement on TSA's website in March 2006 stating that a passenger "must present one form of photo identification." Pet. 10. But the website currently states:

> We encourage each adult traveler to keep his/her airline boarding pass and government-issued photo ID available until exiting the security checkpoint. The absence of proper identification will result in additional screening.

TSA, *Our Travelers: The Screening Experience* <http://www.tsa.gov/travelers/airtravel/screening/index.shtm> (visited Sept. 13, 2006). To the extent that petitioner's question presented relies on the old website statement, the question does not have any ongoing relevance.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Congress, moreover, has recently provided for new procedures for dealing with lawful requests to TSA for SSI information, including during the course of civil litigation. See Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 525(a)(1) and (d), 120 Stat. 1355, 1381-1382. Thus, any issue concerning the TSA's process for handling SSI information in the context of civil litigation is of limited ongoing significance.